(4)

No. 08-1389

Supreme Court, U.S.
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In the

Supreme Court of the United States

JOHN PRELESNIK,
Petitioner,

v.

CHAMAR AVERY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully petitions for rehearing of this Court's October 5, 2009 order. Specifically, Petitioner respectfully requests that this Honorable court (1) grant rehearing; and (2) hold this case in abeyance for this Court's decision in *Smith v. Spisak*, a case in which this Court has granted certiorari to the Sixth Circuit to address that court's failure to accord State court decisions with the proper level of deference required by Antiterrorism and Effective Death Penalty Act (AEDPA).

Although this Court has established stringent standards for rehearing, this case falls within one of the exceptions contemplated by Sup. Ct. R. 44.2. The relevant exception exists where this Court has granted review of a related issue in another case.[1] On October 13, 2009, following the denial of certiorari in this case, this Court heard oral argument in *Smith v. Spisak*, No. 08-724. One of the issues before the Court in *Spisak* is whether "the Sixth Circuit exceeded its authority under AEDPA when it applied *United States v. Cronic* [], to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements." Substantially the same question was raised in the instant case, in that the issue raised in this petition is whether the Sixth Circuit "abrogated the 'prejudice' prong of *Strickland v. Washington*."

This case, just like *Spisak*, involves a question of whether the Sixth Circuit exceeded its authority under AEDPA by imposing a *Cronic* standard to a claim of ineffective assistance of counsel on habeas review. In *Spisak*, the Sixth Circuit concluded that trial counsel's closing argument – where he recited several aggravating

[1] See, e.g., *Florida v. Rodriguez*, 461 U.S. 940 (1983).

factors against his client based on his clients own testimony at trial – was ineffective. However, instead of analyzing the error under the second prong of *Strickland*, the Sixth Circuit concluded without analysis that "[a]bsent trial counsel's behavior during the closing argument of the mitigating phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death . . . ."[2]

The Sixth Circuit's surreptitious application of *Cronic* – without citing that case – was repeated in the instant case. Here, the Sixth Circuit concluded that Respondent's counsel was ineffective for failing to interview two alibi witnesses that the State trial court found to be wholly unbelievable. But rather than analyze this error under the second prong of *Strickland*, the Sixth Circuit instead opined that the failure to call the witnesses deprived Respondent of "a reasonable shot of acquittal" and, therefore, he was prejudiced by the loss of that "shot." In other words, the same question before this Court in *Spisak* controls the outcome in this case. That is, did the Sixth Circuit apply a *Cronic* standard to the Respondent's ineffective assistance of counsel claim? And, is the application of a *Cronic* standard consistent with the requirements of the AEDPA?

Given that this related question is already before the Court, it would be appropriate to hold the petition for certiorari in the instant case in abeyance pending this Court's decision in *Spisak*. Indeed, it would be quite helpful to this Court's consideration of the issue in *Spisak* to consider the instant case at the same time it considers the *Spisak* case, thereby fully exploring the

[2] *Spisak v. Mitchell*, 465 F.3d 684, 706 (6th Cir. 2006).

scope of the second-prong of *Strickland* in the context of the AEDPA standard.

For these reasons, the motion for rehearing should be granted, and this case should be held in abeyance pending the decision in *Spisak*.

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Dated: October 2009

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2. Specifically, Respondent was released from custody in 2008.

B. Eric Restuccia
Michigan Solicitor General